

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

THE PEOPLE OF THE STATE OF NEW YORK

-against-
Domenic Franza,
Defendant.

* DECISION AND ORDER
* Ind No. 1647/91
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Bookson, J.

Defendant, on his own case, seeks a ruling from this Court allowing him to impeach one of his own witnesses with prior Grand Jury testimony. Cesar Rodriguez, the Federal Express clerk who processed the intake of the package containing the pipe bomb, testified outside the presence of the jury that the person who dropped off the package returned with a money order already filled out. In his Grand Jury testimony, though, Rodriguez testified that the money order was filled out on his presence. Since Rodriguez was unable to pick out defendant in a line-up as the person who dropped off the package, and Detective Breslin testified that the handwriting on the money order matched defendant's known handwriting, such impeachment with the witness's Grand Jury testimony would be of value to defendant.

For two reasons, defendant's motion to impeach the witness with his Grand Jury testimony is denied. Most importantly, I find this proffer by defendant runs afoul of CPL 60.35(2) which forbids the impeachment of one's own witness as evidence-in-chief. Although defendant claims that he seeks only to challenge the credibility of the witness, defendant would impeach him with only this one aspect of his Grand Jury testimony. Defendant's generous offer to cure a problem of his own making, is in reality an attempt to circumvent the rule against impeaching one's own witness as a method of developing evidence in chief. In fact, in all other respects defendant's case is buttressed by the witness's testimony, in light of the fact that Rodriguez did not pick defendant out of the line-up. It is not contested by defendant that his intention was to argue to the jury that the person who filled out the money order did so in Cesar Rodriguez's presence, and that this person was not identified as Domenic Franza. Yet this is just the sort of tactic proscribed by 60.35(2), as the issue of Rodriguez's credibility is really a red herring in this case. In *People v. Dann*, 100 AD2d 909, the Court held that the request to refresh the witness's recollection could not be used as a ruse to circumvent the statute. Similarly, defendant cannot claim to impeach credibility to harvest a useful but inadmissible piece of hearsay from the Grand Jury.

Secondly, although this Court recognizes the utility of the prior statement to defendant's case, Rodriguez's current testimony is not affirmatively damaging to his case within the meaning of 60.35(1). Rodriguez states only that he could not identify defendant as the sender. He does not state categorically that defendant did not drop off the bomb. Since the core of his testimony is this ambiguity, I find that he can not be properly impeached in the manner sought.

SO ORDERED.

DATED: 3/5/92

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JUSTICE OF THE SUPREME COURT